APPENDIX.

Statement of Proceedings Below, 1924 to 1946.

(1) Original suit based on contract for tunnel. Misrepresentation geological data alleged. Quatum meruit claimed for excavating materials caved in from roof above pay line. Court of Claims held misrepresentation not proved; denied claim. 76 Ct. Clms. 64, March 7, 1932. Judgment became final.

Suit No. K-366 in the Court of Claims, *Allen Pope* v. *The United States*, was based on a contract as cause of action. Officers of the Army Engineer Corps represented the United States. The contract, dated December 3, 1924, provided for the construction of a tunnel for the water supply system of the District of Columbia. As inducements for agreement to limit payments, on unit price bases, for excavation and other work performed, to a fixed pay line, called the "B" line, the Government made representations as to adequate use of timber, use of concrete, use of dry packing and grout, all as the conditions actually encountered might develop need therefor, and specified that material from the excavation would be permitted to be used in making crushed rock for concrete and stone for drypacking. As additional inducement under this contract, the Government warranted descriptions of geological formations revealed by test borings which it made on the tunnel site, the said descriptions being given on the contract drawing and indicating "hard rock" for most part. Actually, no hard rock was encountered in the tunnel. The ground caved to the surface above in two places and caved above the agreed "B", or pay, line throughout the whole length of the tunnnel. It even caved in where the Government's test holes were met with; and, at every such point, the contracting officer required timber supports to be used.

Petitioner claimed on a *quantum meruit* $85,950.00 for additional cost of excavation, the Government having paid only for excavation of materials originally within the "B"

line, but having required all excavation to be done and having received the benefit. This additional expense was solely the cost of excavating the materials which caved in from above the agreed pay line. The Government paid separately for other items of expense thereby involved such as all timbering, some increased excavation, some concrete, and some drypacking and grout; but declined to pay for any of this work of excavation and concrete, and for most of the drypacking, and grout pertaining to spaces outside the agreed "B" line. No part of such work would have been necessary nor incurred had the ground been "hard rock" as the Government represented nor if the Government had permitted adequate use of timber to support the excavation. The Court of Claims held that misrepresentation was not proved; that the additional cost of excavation was not established, though it found as fact that it was "materially increased". The claim was denied. 76 Ct. Cls. 64, decided March 7, 1932 (R. 122; R. 9-47; R. 110-146). The judgment became final, motions for new trial having been denied, and term of court having lapsed.

(2) Another contractor, under identical contract provisions, concurrently constructed a similar tunnel for the same water system. Ground also caved in from roof above pay line and caved-in materials were excavated. Upon suit therefor, Court of Claims, of own motion, awarded quantum meruit on different basis than claimed. Court there construed the same provisions, which it now construes differently, defeating petitioner's present claim under the special act. M. A. Long Company v. The United States, 79 Ct. Cls. 656, decided June 4, 1934.

Shortly antedating petitioner's contract, the United States, acting through the same officials, under identical specifications and designs, made contract with another contractor, the M. A. Long Company, to construct another tunnel as part of the same water system. Geological conditions were generally observable at the site. No warranty

as to geological formation was made. Representations as to use of timber, use of excavated materials, use of concrete, use of dry packing and grout where necessary, as inducements to agree to the fixed "B" or pay line for payments at agreed unit rates were the same in both contracts. Construction work under both contracts was concurrent. There, the ground, in one place, caved in over the "B" line to the surface of the ground above. The caved-in materials were required to be excavated but were not paid for. Suit resulted in the Court of Claims. The court, of its own motion, awarded a *quantum meruit* as on an implied contract, the Government having required the work to be done and having received the benefit. *M. A. Long Company* v. *The United States*, 79 Ct. Cls. 656, decided June 4, 1934. Of particular present significance herein (ante, p. 9) is the circumstance that the court below there held with respect to the excavation of the caved-in material *id.* 666:

> It was additional work not within the contemplation of the parties when the contract was made * * *

(3) Petitioner's substantive contract rights concluded by 76 Ct. Cls. 64. Testimony M. A. Long Case, Id. revealed sources of proofs of irregularities in petitioner's case whereby acts of respondent's representatives, extrinsic to the issues, had foreclosed to petitioner a real trial of the issues. Three out-of-term motions for new trial on such basis denied, but court impressed. Written opinions given in 81 Ct. Cls. 658; 86 Ct. Cls. 18. Certiorari thereon denied, not on the merits under the contract, but on the alleged irregularities. 303 U. S. 354.

Petitioner's substantive rights under his contract stood definitely concluded by the final judgment of 76 Ct. Cls. 64. Other considerations accounted for his refusal for three years thereafter to accept the amount that had been appropriated in settlement of that judgment. There had been gross irregularities in the trial. The testimony and findings in the said *M. A. Long case*, 79 Ct. Cls. 656, seemed to

open ways in which to present said irregularities to the court such that, notwithstanding the finality of the judgment, it might be shown that petitioner had never had a real trial of the issues in his case, and the same be opened for trial. Investigation revealed many frauds perpetrated on the Government, and on the court, as well as on petitioner. It was too late to complain of deceptions. Petitioner thought it not too late to complain of acts on the part of respondent's representatives, its agents, engineers, witnesses and attorneys, which were extrinsic to the issues in suit, but which had prevented the petitioner, the unsuccessful party, from having a full and fair trial of the issues in his case. Petitioner made three out-of-term motions for new trial (motion for a trial he termed the fourth and fifth) and accompanied them by evidence, as required, showing among other things fabricated job reports, deleted records of testimony, scratching the court's docket, destruction of evidence, destruction of the test-boring cores, which would have proved the character of the ground at a glance, manufacture of evidence which the court used verbatim as basis for its decision defeating petitioner's claim, threats of avowed purpose to wear out petitioner by prolonged litigation, besides many downright frauds upon both the Government and the court. These out-of-term motions were based on the proposition not that the court was mistaken but that it was probably misled. The court declined to allow the allegations to be proved. No appeal lay to any higher court. The time was after the Act of February 13, 1925, and before the Act of May 22, 1939, when no question of fact could be brought to this Court on certiorari. The court below was impressed, but only to the extent of suggesting legislation in Congress which would remedy its asserted lack of jurisdiction. It offered petitioner, in open court, to provide Congress with factual data with respect to the irregularities listed. Its written decisions, 81 Ct. Cls. 658 and 86 Ct. Cls. 18, as well as the petition for certiorari, 303 U. S. 654, were concerned only with this question of

acts of respondent extrinsic to the issues which were contended to have foreclosed a real trial of the issues. They were not concerned with petitioner's substantive rights under the contract, which, at that time, even as now, stood finally concluded.

(4) On advice of lower court, petitioner sought legislation to remedy the mischief whereby the court was misled and petitioner prevented having real trial of issues by reason irregularities practiced by respondent's representatives; the act to supply the necessary jurisdiction. The Attorney General opposed. Enactment failed. H. R. 9082, Jan. 20, 1938; S. 3406, Feb. 7, 1938; S. 744, Jan. 17, 1939.

Acting upon the lower court's suggestion and on copies of Acts of Congress and decisions of the Court of Claims based thereon as given him by the then Chief Justice, petitioner applied to Congress for *legislation to remedy the mischief caused by the irregularities and extrinsic acts* alleged to have misled the court so as to have foreclosed to petitioner a real trial of the issues, and whereof the court complained that it had no jurisdiction. Petitioner merely asked Congress that the Court of Claims be granted jurisdiction accordingly, i. e., "as though his fourth motion for new trial were granted". See titles of bills; citations below. The Attorney General opposed on the ground that such legislation would reopen all the issues and that petitioner had had his day in court. Petitioner's first three bills in Congress were to the same purpose and met the same fate. H. R. 9082, Jan. 20, 1938; S. 3406, Feb. 7, 1938; S. 744, Jan. 17, 1939. See Appendix to Petition for Certiorari, pp. 15, 16.

(5) Petitioner abandoned effort to get legislation to revive substantive rights of contract. Instead he petitioned Congress to create new liability of the Government for beneficial work done and remaining unpaid for, naming the "excavating of materials which caved in over the tunnel arch".

Attorney General withdrew opposition, tacitly approved bill, which was enacted as 56 Stat. 1122, approved February 27, 1942.

Petitioner thereupon abandoned effort to secure legislation which would enable reassertion of any substantive rights under the contract, either by the parties or by the judiciary. The judgment, 76 Ct. Cls. 64, based on the contract stood then and still stands conclusive upon all, i.e., the parties, the Congress and the Judiciary. Petitioner asked Congress to create a new liability of the Government *to remedy the mischief where petitioner had performed work for the Government of which it had received the benefit but for which it had not paid*, and named, among particular items, "the work of excavating the materials which caved in over the tunnel arch". As basis for payment, he requested that the unit rates of the prior contract be named for the four different items to be claimed, i. e., for excavation, concrete, dry packing, and grout. No conditions of any nature of the prior contract were specified. The Attorney General tacitly approved the bill so drafted by not opposing it and by suggesting it to be matter within the province of Congress to decide for itself. The bill was enacted as 56 Stat. 1122, approved February 27, 1942.

(6) Court of Claims declared special act unconstitutional; singled out claim for excavation of materials caved in from tunnel roof to demonstrate that Congress could not authorize adjudication of claim once finally decided in that court, nor prescribe a method for adjudication. 100 Ct. Cls. 375. January 3, 1944.

In an action, No. 45704 in the Court of Claims, pleaded on the rights explicitly expressed in the Special Act and relying upon the prescription for adjudication therein given, the court below now having another as Chief Justice and three new judges, denounced the Act as unconstitutional, as being beyond the power of Congress to authorize adjudi-

cation of a claim once finally decided by that court and as wholly outside its province to prescribe a manner of rendering judgment to the judiciary. As illustrating its decision, it singled out and derided the express provision supplying right of action at the contract rates "for the work of excavating materials which caved in over the tunnel arch." 100 Ct. Cls. 375 (R. 55-57) the same being the item still being contended for.

(7) On certiorari, this court held special act constitutional; declared Congress had created new liabilities of the Government for the work described, and was within its province is establishing the prescriptions for judgment set out.. 323 U. S. 1, November 16, 1944; mandate December 5, 1944.

Upon issuance of writ of certiorari to the Court of Claims reviewing their judgment of 100 Ct. Cls. 375, this Court held the Special Act constitutional; that its provisions authorizing claims, including the express claim "for the work of excavating the materials which caved in over the tunnel arch", were new liabilities of the Government created by Congress and that the prescriptions to the Court of Claims for manner of adjudication were also wholly within the constitutional province of the Congress. The mandate of December 5, 1944, ordered the Court of Claims to render judgment for petitioner in accordance with this Court's opinion of November 16, 1944. 323 U. S. 1.

(8) Responsive to the Mandate, Court of Claims unanimously found all facts essential to judgment under special act for all items claimed including item 2 pleaded as "excavating materials which caved in over the tunnel arch". Recovery therefor denied, 62 Fed. Sup. 408, October 1, 1945.

Responsive to the mandate of December 5, 1944, it is here important to observe because heretofore over-shadowed, the lower court unanimously made Special Findings of Fact

of all the ultimate facts essential to judgment for the claim pleaded under the Special Act "for the work of excavating the materials which caved in over the tunnel arch". These findings of ultimate fact were sustained by other findings of evidenciary fact showing total quantities, quantities otherwise paid for, rates, manner of computation, etc. These Special Findings of Fact were based on the evidence, upon the report of the commissioner, and upon the oral argument. They are responsive to the pleadings, and responsive to the mandate.

(9) Recovery denied for item 2 excavation caved-in materials. 62 Fed. Sup. October 1, 1945.

Notwithstanding the complete and sufficient Special Findings of ultimate fact, and notwithstanding this Court's mandate, the lower court denied recovery for this item "for work of excavating the materials which caved in over the tunnel arch". 62 Fed. Sup. 408, October 1, 1945. (R. 70-83).

(10) Conflicts in this decision: Three other items excavation of caved-in materials awarded. But this identical item denied. 62 Fed. Sup. 408, October 1, 1945.

Also of importance in connection with the instant petition, as having been completely overshadowed heretofore, is the fact that the lower court, likewise unanimously, made positive findings of facts essential to judgment for three other items of excavation of materials caved in from outside the "B" pay line and awarded judgment therefor as claimed and at the same time also allowed payment for the refilling of the caved-in or thereby voided spaces. It awarded for 57 cubic yards of materials caved in over the arch at the contract rate (R. 69) and for the drypacking and grout which refilled that space (R. 71). It previously paid at the contract rate for 723 cubic yards of materials caved in over the arch (Fdg. 1, R. 64) and here paid for refilling the space so void with drypacking and grout. It

awarded here at the contract rate for 287 cubic yards of excavation of materials caved in outside the pay line in the walls and also paid for refilling the resultant spaces with concrete (R. 69-70). See sketch opposite p. 10, ante.

(11) Crucial Finding. Majority below made special finding of fact that, under original contract of prior case, the work of excavating materials which caved in over the tunnel arch was contract work payable by payments made for drypacking and grout thereunder, not by separate payment as for excavation. Finding not based on Commissioner's report; nor on hearing before all deciding judges; nor on evidenciary findings, but contrary thereto. Finding not responsive to pleadings; not responsive to mandate; not made within the jurisdiction granted by special act.

The majority below, two judges dissenting, made what served it as the decisive finding of the case to deny petitioner payment "for the work of excavating the materials which caved in over the tunnel arch", by adding the following statement to finding 8 (R. 67):

> but, as to the work of disposing of the materials which caved in from the top of the tunnel, the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for drypacking and grouting the spaces left by the cave-ins.

This finding is contrary to the evidenciary findings, i.e., the prior contract provisions, which were also set out in finding 7 and by finding 1, noted post, p. . This finding is believed not made within the court's jurisdiction under the Special Act. It is not based on the commissioner's report. The commissioner's report is set out in full Case No. 26, October Term, 1944, Appendix to Petitioner's Supplemental Brief on Petition for Writ of Cer-

tiorari, pp. 34-37. It is not based on the hearing in the sense that the judge who supplied the requisite third vote did not hear the oral argument. It is not responsive to the pleadings. Neither party so raised the issue. No jurisdiction is given by the Special Act to readjudicate anything under the old contract. The jurisdiction of the Court of Claims over issues of the old contract lapsed with its final judgment in case No. K-366, 76 Ct. Cls. 64.

(12) Finding conflicts with court's interpretation same contract provisions in M. A. Long Case.

This finding (Is it not really a conclusion of law, interpreting the old contract?) is directly opposed to that court's interpretation of identical contract provisions in the M. A. Long Case, *ante* p. ..... In that case, the court held that excavation of caved-in materials was not contract work. In petitioner's case, it holds that payments for drypacking and grout pay for that work, i.e., that it is contract work.

(13) Evidenciary findings of old contract provisions. Special findings of fact not evidence.

The lower court made evidenciary findings in respect of what the old contract obligations were. They do not sustain the conclusion to Finding 8. As its Finding 7 (R. 65, 66), the court below sets out specification paragraphs 48, *Measurements;* 58, *Excavation in Tunnel;* and 62, *Drypacking and Grouting in Tunnel.* Finding 1 by reference made the whole of the original contract part thereof, including all the specifications and plans, the same being part of the original findings and so incorporated in the transcript of record hereof (R. 63; R. 110-122; R. 9-47; R. 146).

It is important to observe that these evidenciary findings are Special Findings of Fact, not merely evidence incorporated and sent up with the transcript of the record in the case.

(14) Finding made by majority of three judges, one of whom was not present at trial; two judges who were present dissented.

This concluding finding, made by the majority below, and upon which the same majority denied recovery for the excavation of caved-in materials, Item 2 of the pleading (R. 3, 4-6, 8), was made by three of the five judges of the court, one of whom had not theretofore participated in the case and who had not heard the oral arguments. It was opposed by two judges who had participated and who had heard the oral arguments. The said judge, whose vote provided the requisite concurrence of three, was absent on war assignment during the trial. He did not return until June 30, 1945, when the court was already in vacation recess. He was qualified; and otherwise possessed the jurisdiction as did the other judges. No notice was given by the court to the parties that the said judge was to sit in decision, nor were the parties invited to reargue the case before him, before a full bench. Instead, the court, on October 1, 1945, the first day after recess, announced its judgment in the foregoing manner, denying claim for excavation of caved-in materials.

(15) Petition for certiorari. Voluminous transcript sent up consists mostly of findings and references to old contract and to old, concluded case based thereon; completely dominates and overshadows matter pertinent to present case.

Petitioner herein petitioned this Court for issuance of writ of certiorari to the Court of Claims for review of the latter's judgment of October 1, 1945. The lower court sent up as transcript of the record in the case a great mass, 146 pages, of data pertaining to the previously decided case based on the original contract. In the first place, its present findings of fact relate almost entirely to the old case under the contract, though they do include the facts essential to judgment in this case pleaded under the Special Act.

In petitioner's Case No. 26, October Term, 1944, the lower court sent up the *contract as evidence*. In the present case No. 520, October Term, 1945, they sent up the *contract as findings*. They also made findings of the prior findings based on the contract. They further sent up as evidence, as part of the transcript, the opinion of the court below in that case based on the contract, 76 Ct. Cls. 64 (R. 122-145). The court's present opinion as well as the dissenting opinion are devoted almost exclusively to discussion of merits under the contract. Petitioner's counsel expressed the question presented in very broad terms, i.e., "has the court properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122), in accordance with decisions and mandate of this Court?" Further and possibly without sufficiently explicit reference, the assignments of error were likewise stated in general terms. Thus the original contract and issues based thereon dominate the present record, completely overshadowing the few paragraphs given to the issue raised by the Special Act.

(16) Petition for certiorari denied. No grounds given.

This Court denied petition for certiorari on January 2, 1946, without stating grounds for denial.

(17) Petition for rehearing based on three other similar three-to-two decisions intervening below. Petition rehearing denied; grounds not stated.

After denial of certiorari three other, similar, three-to-two decisions below stood intervening. In each case the vote of the same absentee judge supplied the necessary third concurring vote. Further action thereon was pending. After denial of certiorari in petitioner's case, the lower court overruled motions for new trial in two. Petitioner then filed petition for rehearing predicating the same upon intervening pending cases based upon the principle of the absentee judge casting the conclusive vote in the Court of Claims where the *nisi prius* is the court, and from

whose decision no appeal lies as of right. These three pending cases were listed on page 13 of petitioner's Petition for Rehearing. This Court, again not stating grounds, denied the petition for rehearing on February 4, 1946.

(18) The present status of these cases is as follows:

No. 45,596, further action was dropped; the then standing decision, right or wrong, enabled an estate to be settled. In No. 45,889, the plaintiff therein made two successive motions for new trial contending that its case was not submitted on the briefs, but on oral argument, which was not heard by all the judges who gave decision; new trial was denied. In the third other case, No. 45,455, *Geo. F. Driscoll Company* v. *The United States,* motion for new trial was denied and the case is now here No. 1034, October Term, 1945, pending on petition for certiorari.